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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM P. BESSER,

Petitioner,

-v- CASE NO. 79-5710

ROBERT GRAHAM, Governor of Florida,

Respondent.

ORIGINAL COPY

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Florida denying petitioner's petition for writ of habeas corpus was handed down November 1, 1979 and is reported at 376 So.2d 857.

JURISDICTION

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code, §1257(3), or any other provision thereof, at least for the purpose of determining whether to decline assumption thereof.

QUESTION PRESENTED

WHETHER SECTION 944.275, FLORIDA STATUTES, AS APPLIED TO PETITIONER, IS AN EX POST FACTO LAW.

PRELIMINARY STATEMENT

Respondent believes that the appendix submitted by petitioner is adequate for the purposes of this certiorari proceeding. References thereto will be made by the symbol "A" followed by appropriate page number. Any other references will be specifically designated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This proceeding involves Article I, Section 10, Florida Constitution 1968, and Article I, Section 9,

United States Constitution. The validity of Section 944.275, Florida Statutes, is at issue.

ARGUMENT

WHETHER SECTION 944.275, FLORIDA STATUTES, AS APPLIED TO PETITIONER, IS AN EX POST FACTO LAW.

Petitioner complains that he is being deprived of "good time" by an ex post facto law. In essence, it is claimed that since Section 944.275, Florida Statutes, effective July 1, 1978, permits the accumulation of a lesser amount of "good time" than did its predecessor, Section 944.27, the application of the new statute to petitioner in the computation of his gain-time makes the statute an ex post facto law because it was not in effect at the time petitioner was convicted and sentenced. Respondent disagrees. This precise issue has also been rejected by the Florida Supreme Court. See Harris v. Wainwright, 376 So.2d 855 (Fla. 1979).

It is appropriate to begin the discussion on this issue by pointing out that petitioner is incarcerated pursuant to a lawful judgment and sentence which he does not attack. See United States v. Addonozio, _____U.S. _____, 60 L.Ed.2d 805, 99 S.Ct._____(1979); Banks v. State, 342 So.2d 469 (Fla. 1976).

The matter of parole prior to 1940 was within the exclusive of the executive branch of government which exclusively exercised that power through a state board of pardons. Singleton v. State, 38 Fla. 297, 21 So.21 (1897); State ex rel. Morenco v. Mayo, 175 So. 806 (1937). Art.XVI, §32,Fla.Const. (1885), was adopted through constitutional

amendment in 1940 and is substantially similar to Art. IV, §8(c), Fla.Const. (1968). See 26 F.S.A. Art. IV, §8(c), Fla.Const. (1968), p. 121. Thus, prior to 1940, there was no constitutional authorization for the legislative creation of a Parole and Probation Commission. In addition, given the constitutional amendment in 1940 and revision in 1968, the provisions for legislative creation of a Parole and Probation Commission were housed within the executive articles of the Constitution, emphasizing the executive nature and origin of parole. Today, the State Board of Pardons, which is an arm of the executive, is the exclusive grantor of "conditional paroles" or "pardons," Beal v. Mayo, 70 So.2d 367 (Fla. 1954) and executive clemency. Sullivan v. Askew, 348 So.2d 312 (Fla. 1977), cert. den., 434 U.S. 878 (1977).

In emphasizing the executive nature of parole, the courts have rejected legislation imposing duties upon or granting powers to the Board of Pardons prior to the adoption in 1940 of Art.XVI, §32,Fla.Const. (1885), for unconstitutionally infringing upon the executive discretion of said Board which, inter alia, then granted paroles. Ex Parte White, 131 Fla. 83, 178 So. 876 (1938).

Moreover, in Marsh v. Garwood, 65 So.2d 15 (Fla. 1953), the Florida Supreme Court stated that the judiciary was without authority to exercise parole powers "for that is strictly a function of the executive branch of the government to be exercised only after the defendant has been convicted and sentenced and hence after the judicial labor has come to an end." Marsh v. Garwood, 65 So.2d at 21. Dye v. United States Parole Commission, 558 F.2d 1376 (10th Cir. 1977); Wright v. State, 342 So.2d 565 (Fla.App. 1 1977); Cf.

Brest v. Ciccone, 371 F.2d 981, 982-983 (8th Cir. 1967). Thus, until 1940, the exercise of parole powers was inextricably and exclusively wed with the exercise of the power of pardon which has been exercised from time immemorial by the executive and could not and still cannot be infringed upon by the Legislature. Singleton v. State, supra. See also, In Re Advisory Opinion to Governor, 64 Fla. 21, 59 So. 786 (1912).

The purpose of tracing the early legal history of the Parole and Probation Commission is to establish that prior to the adoption of Art.XVI, §32,Fla.Const. (1885), in 1940, the power to grant or deny parole was part and parcel of the power of pardon which is an exclusive power of the executive branch of government, in that such powers were exclusively exercised by the State Board of Pardons which continues today to exclusively exercise all powers of executive clemency without legislative restraint. Sullivan v. Askew, supra. Finally, it is respondent's position that Art.IV, §8(c),Fla.Const. (1968), does not vest parole powers in the legislative branch of government, does not change the executive nature of parole, does not place the Commission under the constitutional control of the Legislature, and does not permit the Legislature to restrict, impede, qualify, intercede upon, tamper with, or overrule the Commission in the exercise of its parole powers. Art.IV, §8(c),Fla.Const. (1968) serves only to authorize the legislative creation of a Parole and Probation Commission which is then empowered by the Constitution, not by statute, "to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime." If the Legislature had merely passed legislation creating such a Commission and had failed to statutorily provide or prescribe the powers and duties of the Commission, it would nonetheless possess and be able to exercise those powers set forth in the aforecited

constitutional provision for, although that provision is not self-enacting in regard to creation, once creation is effected, the powers of the Commission flow automatically and without restraint from the Constitution which is their genesis. Thus, although the Commission is created by legislative action, it nonetheless exercises powers exclusive to the executive branch. The Legislature is therefore barred by the doctrine of separation of powers from interferring in any manner with the exercise of those executive powers. Cf. Sullivan v. Askew, supra; Advisory Opinion Of The Governor, In Re Administrative Procedure Act: Executive Clemency, 334 So.2d 561 (Fla. 1976); In Re Advisory Opinion Of The Governor Civil Rights, 306 So.2d 520 (Fla. 1975); Singleton v. State, supra; Art.II, §3, Fla.Const. (1968).

Based upon the foregoing, and under Florida law, there is no right to parole; it is a matter of grace, not of right. Dear v. Mayo, 14 So.2d 267. See Greenholtz v. Inmates of the Nebraska Penal Complex, _____ U.S. ____, 60 L.Ed.2d 668, 675, 99 S.Ct. 2100 (1979); Brown v. Lundgren, 528 F.2d 1050, 1052-53 (5th Cir. 1976); Lashley v. State of Florida, 413 F.Supp. 850 (M.D. Fla. 1976). In addition, in United States v. Addonizio, supra, the Court stated:

> To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would substantially undermine the congressional decision to entrust release determinations to the Commission and not the courts. . . .

Id. at 814. Cf. Brest v. Ciccone, supra.

Based upon the foregoing, it is respondent's position that petitioner does not possess any "right" to parole

nor to the "accumulation of gain-time" protected by the United States or Florida constitutions. This is so because neither constitution protects that which it does not guarantee. Consequently, petitioner's argument is without merit. Greenholtz, supra, 60 L.Ed.2d at 677; Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir. 1976); McIntosh v. Woodward, 514 F.2d 95 (5th Cir. 1975).

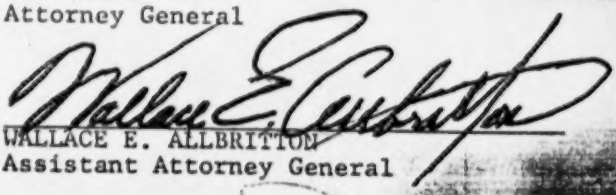
Appellate courts throughout the country have repeatedly recognized that the allowing of gain-time is an act of grace and that a prisoner has no right to receive gain-time in the absence of a legislative provision therefor. In other words, gain-time allowance is an act of grace rather than a vested right and may be withdrawn, modified, or denied. Graham v. Thompson, 246 F.2d 805 (10th Cir. 1957); People ex rel. Kleinger v. Wilson, 5 N.Y.S.2d 934 (S.Ct.App.Div. 3 1938); Gilstrap v. Clemmer, 284 F.2d 804 (4th Cir. 1960); Kastel v. Fish, 36 F.Supp. 700 (D.C.Md. 1931); Estrabrook v. King, 119 F.2d 607 (8th Cir. 1941); Comerford v. Commissioner of Correction, 141 N.E.2d 893 (Mass. 1957); Comerford v. Massachusetts, 233 F.2d 294 (1st Cir. 1956), cert. denied 352 U.S. 899; Lembersky v. Parole Board of Dept. of Correction, 124 N.E.2d 521 (Mass. 1955); People ex rel. Colletti v. Pate, 201 N.E.2d 390 (Ill. 1964); Hiatt v. Compagna, 178 F.2d 42 (5th Cir. 1949), aff'd 340 U.S. 880; Shattuck v. Grider, 493 P.2d 829 (Okla.Crim.App. 1972), citing Dear v. Mayo, 14 So.2d 267 (Fla. 1943), with approval. The decision of the Louisiana Supreme Court in State v. Curtis, 363 So.2d 1375 (La. 1978), is clearly distinguishable from the issue presented sub judice. In Curtis, the court pointed out that the statute there under attack applied "a new punitive measure to a crime already consummated to the detriment or material disadvantage of the wrongdoer."

The statute here under attack, Section 944.275, Florida Statutes, has no relation to sentencing and does not apply any punitive measure to a crime already consummated to petitioner's detriment or material disadvantage. Particularly is this true when viewed in the context of Florida's law which has long held that the granting of parole and allowance of gain-time is a matter of grace rather than a vested right and may be withdrawn, modified, or denied. Mayo v. Lukers, 53 So.2d 916 (Fla. 1951); Kimmons v. Wainwright, 338 So.2d 239 (Fla. App. 1 1976).

CONCLUSION

The petition for writ of certiorari should be denied.

JIM SMITH
Attorney General

By: 
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